No. 82-1435

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FILED
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONTRA COSTA THEATRE, INC., a corporation,
Petitioner,

vs.

CITY OF CONCORD, a municipal corporation,
REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,
WILLIAM H. DIXON, RICHARD L. HOLMES, JUNE V. BULMAN,
LAURENCE B. AZEVEDO, RICHARD T. LA POINTE,
FARREL A. STEWART, RICHARD C. STOCKWELL,
PETER H. HIRANO, JAMES MURPHEY, EDWARD H. PHILLIPS,
GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK,
ROBERT T. BARKOFF, LYNNET A. KEIHL, DAVID STEELE,
ROBERT C. BINGHAM, JON Q. REYNOLDS, JR.,
MILTON D. REDFORD, DAVID A. BROWN,
DELTA BINGHAM JOINT VENTURE, a partnership,
REYNOLDS & BROWN, a partnership, and
DOES I through 100,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a hearing on a real property owner's application for a use permit, which application complies with and meets the standards of state and local laws, practices and procedures, involve an interest in, or entitlement to, a benefit which is a form of property right to which federal constitutional guarantees apply in the proceedings of the quasi-judicial city agency which makes the decision on the application?

2. Is the denial of a hearing by a quasi-judicial city agency, on an application for a use permit, a deprivation under color of law of either due process or equal protection, or both, in violation of Title 42 U.S.C. §1983?

3. Is a hearing, the result of which has been predetermined in bad faith by a quasi-judicial body empowered to

make a decision, in conspiracy with other city officials and employees and private parties, for the purpose of depressing the value of real property in anticipation of an eminent domain action, the legal equivalent of denial of a hearing, and, thus, a deprivation of civil rights for which §1983 is a remedy?

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No.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1982

CONTRA COSTA THEATRE, INC.,
a corporation,

Petitioner,

vs.

CITY OF CONCORD,
a municipal corporation,
REDEVELOPMENT AGENCY OF THE
CITY OF CONCORD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Ninth Circuit entered in the above

case on September 8 and November 29, 1982, which affirmed the decision of the United States District Court for the Northern District of California and denied a petition for a rehearing.

CITATIONS OF OPINIONS BELOW

The first order of the Ninth Circuit Court of Appeals is reported at 686 F.2d 798. The order denying the petition for a rehearing is unreported and is printed in Appendix B hereof at pages 1 and 2. The first decision of the District Court of the Northern District of California is reported at 511 F.Supp. 87. The second decision is unreported and is printed in Appendix B, at pages 3 to 6.

JURISDICTION

The order denying rehearing was entered on November 29, 1982. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The statutory provisions are 28 U.S.C. §1254(1) and 42 U.S.C. §1983.

STATEMENT OF THE CASE

Petitioner filed its action for damages under 42 U.S. Code §1983 following the denial by the Planning Commission of the City of Concord, California, of a hearing on an application for a use permit for real property. The defendants (respondents) were the Planning Commissioners, the City Council members, the City Manager, Planning Department employees and private developers, who conspired together to effect the denial of a hearing on the use permit application for the purpose of depressing the value of petitioner's property in anticipation of an eminent

domain proceeding.

Petitioner, owner of a long-term leasehold on which it operated an outdoor theatre, applied for a permit to install additional screens. While the application was pending the City and its Redevelopment Agency adopted a redevelopment plan applicable to the area in which the property lay. Then the respondents began secret discussions among themselves regarding the acquisition of petitioner's property and its sale to the private developers for a so-called redevelopment project. At the hearing on petitioner's application for a use permit, although official reasons were stated for denial, petitioner's evidence was not given consideration and the application was denied pursuant to the prearrangement among the respondents. Four months later, resolutions to condemn

petitioner's property and to approve execution of a contract for sale of the property to the private developers were adopted at the same session of the City Redevelopment Agency. Subsequently, an eminent domain action was instituted and the property was taken, the value of the property being determined on the basis of a single screen, rather than a multiple screen, theatre.

The District Court dismissed petitioner's complaint on the ground that plaintiff had failed to state a claim cognizable under §1983 because it had no "property right" to which constitutional guarantees applied. After an amendment to the complaint the District Court ruled a second time to the same effect. An appeal was taken to the Circuit Court, which affirmed the decision of the District Court by adopting its reasoning

and without writing an opinion. A petition for rehearing was disposed of by the Circuit Court in a brief order.

ARGUMENT

The heart of the matter is the narrow construction imposed by the Circuit Court (adopting the reasoning of the District Court) on the meaning of "property" interests under Board of Regents v. Roth (1972) 408 U.S. 564, 571-2, and Perry v. Sindermann (1972) 408 U.S. 593, 601. Roth said that property interests extend well beyond actual ownership of real estate, chattels or money, and Perry said that they are not limited to a few, rigid technical forms, but denote a broad range of interests that are secured by "existing rules or understandings." Perry further stated (ibid.) that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the

benefit and that he may invoke at a hearing."

In this case an application by an owner of real property for a permit to use its property in a particular way has been held not to involve a property interest. The Ninth Circuit Court of Appeals has thereby introduced a restriction on Roth and Perry contrary to their interest and meaning and has excluded such a property owner from the protections of due process and equal protection under the United States Constitution.

The erroneous theory is that a property right or interest must be already vested in order to entitle the owner to constitutional protections. This theory conflicts with the decisions of this Court and other Circuit Courts. They hold that it is not necessary for a

right to be vested, but rather that the owner of an interest or right is entitled to protection if: (a) he seeks a definable benefit; (b) sufficiently definite standards are set by law, rule or mutually explicit understanding for determining the granting or denial of the benefit; (c) the administrative or quasi-judicial body has power to make a decision on an application for the benefit by applying the standards to the evidence offered in support of the application; and (d) a hearing before that body is provided for. If those elements can be shown, the benefit is a property interest or right. Then the procedural safeguards of the Constitution apply and the deprivation of those safeguards is a violation of Title 42 U.S.C. §1983.

The status of an interest or entitlement to a benefit as a property right within the definitions of Roth and Perry has been recognized in a variety of situations:

(a) land use permit cases: Rogin v. Bensalem Township (CA3 1980) 616 F.2d 680, at 694; Barbaccia v. County of Santa Clara (D.C.N.D.Cal. 1978) 451 F.Supp. 260; and Cordeco Development Corp. v. Santiago Vasquez (CA1 1976) 539 F.2d 256,

(b) a pension application: Basciano v. Herkimer (CA2 1978) 605 F.2d 605, 609;

(c) welfare allowances: Kelly v. Railroad Retirement Board (CA3 1980) 625 F.2d 486, 489-90; Griffeth v. Detrich (CA9 1979) 603 F.2d 118, 120-2; Metcalf v. Trainor (N.D.Ill. 1979) 472 F.Supp. 576, 592; and Baker v. Cincinnati, etc.

Authority (S.D.Oh. 1980) 490 F.Supp. 520 at 532;

(d) utility services: Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1;

(e) parols: Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1; Winsett v. McGinnes (CA3 1980) 617 F.2d 996 at 1007; and Dumschat v. Board of Pardons, State of Connecticut (CA2 1980) 618 F.2d 216, 218-21,

Perry and Roth are natural developments from such cases as Goldsmith v. United States Board of Tax Appeals (1926) 270 U.S. 117 (involving an accountant's application for admission to practice); Burt v. City of New York (CA2 1946) 156 F.2d 791 (involving an architect's request for a permit); Willner v. Committee on Character & Fitness (1963) 373 U.S. 96 (involving an

application for admission to the Bar); Endler v. Schutzbank (1968) 68 Cal.2d 162, (involving a clerk's desire to work for a licensed business); and Goldberg v. Kelly (1970) 397 U.S. 254, (involving an applicant's request for welfare payments).

The foregoing cases are distinguished from those in which standards or qualifications for entitlement were not established or cases in which the decision makers had unlimited discretion, none of which are subject to constitutional protections. The distinguishable cases are Bishop v. Wood (1976) 426 U.S. 341; McElearney v. University of Illinois (CA7 1979) 612 F.2d 285; Heath v. Redbud Hospital Distict (CA9 1980) 620 F.2d 207; Shamie v. City of Pontiac (CA6 1980) 620 F.2d

118 and Vruno v. Schwarzwalder (CA8 1979) 600 F.2d 124.

I. DENIAL OF HEARING BY A QUASI-JUDICIAL CITY AGENCY ON AN APPLICATION FOR A USE PERMIT IS A DEPRIVATION UNDER COLOR OF LAW OF EITHER DUE PROCESS OR EQUAL PROTECTION, OR BOTH

Either state or local law may create and determine the nature and extent of an entitlement or interest in a benefit which constitutes a property right. Memphis Light, Gas & Water Div. v. Craft, supra, 436 U.S. 9.

The Concord city ordinances and California statutes which permitted the adoption of the ordinances, and the California appellate decisions which have interpreted similar ordinances, and the practices and procedures adopted by the City of Concord constitute the rules or mutually explicit understandings designated by Perry. California Government Code §65901 gives a local

board of zoning adjustment the power and obligation to hear and decide applications. Article X of the Concord Municipal Code states the standards and requires the Planning Commission to make findings. The standards or criteria set forth in the Municipal Code have been held by California appellate decisions to be constitutionally adequate and that a "general welfare" standard is the proper measure which the local zoning commission must apply. City & County of S.F. v. Superior Court (1959) 53 C.2d 236, 249-50; Stoddard v. Edelman (1970) 4 C.A.3d 544; and VanSicklen v. Browne (1971) 15 C.A.3d 122, 127.

The action of a planning commission is quasi-judicial under California law. City of Fairfield v. Superior Court (1975) 14 C.3d 768, 773, note 1; Topanga Assn. for A Scenic

Community v. County of Los Angeles (1974) 11 C.3d 506, 517; Tustin Heights Association v. Board of Supervisors (1959) 170 C.A.2d 619, 633, and, most recently, Arnel Redevelopment Co. v. City of Costa Mesa (1980) 28 C.3d 511.

II. DENIAL OF A HEARING ON AN APPLICATION FOR A USE PERMIT IS A DEPRIVATION OF CONSTITUTIONAL RIGHTS, AND IS A VIOLATION OF TITLE 42 U.S.C. §1983

A hearing before a board which has already made up its mind on a matter and merely conducts its proceeding in order to comply with the formal requirements of law is a sham. It is the same as no hearing at all. Simineo v. School District No. 16 (CA10 1979) 594 F.2d 1353, 1356. The Circuit Court held in Stretten v. Wadsworth Veterans Hospital (CA9 1976) 537 F.2d 361, 367, that the right to a fair hearing is implied in the "existing rules or

understandings" which establish the equivalent of a property right. The failure to allow a fair hearing is, as stated in National Small Shipments etc. v. ICC (CADC 1978) 590 F.2d 345 at 351, "offensive in two fundamental respects: (1) [it] violate[s] the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decisionmaking, and (2) [It] foreclose[s] effective judicial review of the agency's final decision." See also U.S. Lines v. Federal Maritime Commission (CADC 1978) 584 F.2d 519, 542; Environmental Defense Fund, Inc. v. Blum (DCDC 1978) 458 F.Supp. 650, 659-60; Carey v. Quern (CA7 1978) 588 F.2d 230, 232; and Quintana v. Harris (DCNM 1980) 491 F.Supp. 1044, 1047. To these may be added the declaration in Palko v. Connecticut (1937) 302 U.S. 319, at 327: "The

hearing, moreover, must be a real one, not a sham or a pretense."

The defendants are a combination of elected and appointed city officials, city employees, and private developers who benefitted from the city action. Under the recent decision of Dennis v. Sparks (1980) 449 U.S. 24, all may be held liable as conspirators.

Both due process and equal protection was denied. The sham hearing was a denial of due process of law, but the equal protection clause is quite capable of raising essentially procedural due process issues also. Stanley v. Illinois (1972) 405 U.S. 645. The equal protection clause has been applied in §1983 cases, such as Cordeco Development Corp. supra; Burt, supra; Mansell v. Saunders (CA5 1967) 372 F.2d 573; and

Sternaman v. County of McHenry (N.D.Ill. 1978) 454 F.Supp. 240, 247-9)

CONCLUSION

It is not that the District Court and Circuit Court merely misinterpreted or misapplied California law. It is that those courts have attempted to restrict the meaning of property interests stated by this Court in Roth and Perry. The remedy sought is an award of damages for the denial of civil rights, not the issuance of a use permit, for the property has long since been taken in eminent domain. The errors of the Circuit and District Courts in misconceiving Roth and Perry can be corrected only by this Court.

Dated: February 25, 1983.

Respectfully submitted,

William L. Knecht
(Counsel of Record)

SAMUEL L. HOLMES
ANGELL, HOLMES & LEA

ATTORNEYS FOR PETITIONER
CONTRA COSTA THEATRE, INC.

28 U.S.C. §1254. Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

***

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX B
(Page 1)

DEC 1 1982

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PHILLIP B. GILBERT
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONTRA COSTA THEATRE, INC., a corporation,

Plaintiff/Appellant,

vs.

CITY OF CONCORD, a municipal corporation, REDEVELOPMENT AGENCY OF THE CITY OF CONCORD, WILLIAM M. DIXON, RICHARD L. HOLMES, JUNE V. SULMAN, LAURENCE B. AZEVEDO, RICHARD T. LA POINTE, FARREL A. STEWART, RICHARD C. STOCKWELL, PETER M. MIRAND, JAMES MURPHEY, EDWARD M. PHILLIPS, GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK, ROBERT T. SARKOFF, LYNNET A. KEIHL, DAVID STEELE, ROBERT C. BINGHAM, JON G. REYNOLDS, JR., MILTON D. REDFORD, DAVID A. BROWN, DELTA BINGHAM JOINT VENTURE, a partnership, REYNOLDS & BROWN, a partnership,

Defendants/Appellees.

No. 81-4072

ORDER

BEFORE: CHOY, PREGERSON and POOLE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

UNITED STATES GOVERNMENT

memorandum

DATE: November 24, 1982

TO: Judge Poole

SUBJECT: Contra Costa Theatre, Inc. v. City of Concord, No. 81-4073

TO: Phillip Winberry, Clerk

I certify that the judges concerned in the above entitled case concur in the attached order. Please file it.

United States Circuit Judge

CFP/lym
Attach.

cc: Judge Choy, w/attach.
Judge Progerson, w/attach.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CONTRA COSTA THEATRE, INC., a Corporation, Plaintiff, v. CITY OF CONCORD, a municipal corporation, et al., Defendants.	NO. C-80-3584-WWS ORDER

Following the Court's prior order of dismissal with leave to amend, plaintiff has now filed an amended complaint which defendants have moved to dismiss.

Defendants are the City of Concord (City), the City's Redevelopment Agency (Agency), individual members of City Council and Agency, City Manager and Assistant City Manager, certain employees of the City's Planning Department, members of the Planning Commission, and private developers (Developers) (partnership and its individual members).

From 1964 until March 22, 1978, plaintiff Contra Costa Theatres (CCT) possessed a leasehold interest in a 13-acre parcel of land in an older section of Concord. This property was subject to the City's General Plan and Central Area Plan, as well as the Agency's Amended Redevelopment Plan. CCT's use of the property for operation of a single screen drive-in theatre conflicted with all 3 plans. (Defendants' Original

Memorandum of P&A, 2:13-16.) A use permit for the drive-in operation had been granted by the City in 1960. On April 16, 1976, CCT filed an application for an amended use permit to expand the scope of its operation to include two or three additional movie screens. (Plaintiff's Amended Complaint, 5:27.) While plaintiff's application was pending, the City Council and Agency publicly adopted the Amended Redevelopment Plan. Discussions between the City and Developers ensued regarding the development of a project on property which included the 13 acres occupied by CCT.

On September 7, 1977, the Planning Commission held a hearing on plaintiff's application for the use permit and denied the application on the ground that it conflicted with the Amended Redevelopment Plan, the General Plan, and the Central Area Plan. Plaintiff did not appeal the denial.

On January 16, 1978, the City Council and Agency passed resolutions condemning plaintiff's property and approving a contract between the Agency and Developers for the sale of plaintiff's property after condemnation.

On March 26, 1978, the City instituted an eminent domain action against plaintiff. Following a jury trial, plaintiff was awarded $750,000 compensation. The court heard CCT's claim that the City and Agency had conspired to deny its use permit application and depress the market value of its property prior to acquisition. It found that CCT had failed to exhaust its remedies, that the Planning Commission had a rational basis for denial of the application irrespective of redevelopment reasons, and that the Planning Commission had informed CCT of those reasons in its denial. An appeal from that decision is pending in the California Court of Appeal.

/

Plaintiff then instituted this action under 42 U.S.C. § 1983, alleging deprivation of its constitutionally protected right to due process and equal protection. On December 1, 1980, this Court dismissed the complaint on the ground that plaintiff had failed to state a claim cognizable under § 1983. Plaintiff was given leave to amend.

In its amended complaint, plaintiff asserts a right to a use permit subject only to compliance with the applicable standards. The denial of the permit is claimed to be a deprivation of a property right.

To the extent that this action is merely a collateral attack on the Planning Commission's denial based on a contention that plaintiff, having complied with the applicable standards, is entitled to a permit as a matter of law, this Court lacks jurisdiction. That issue is one of state law for consideration by a state court with jurisdiction to review the action of the Planning Commission.

To the extent plaintiff claims a constitutional right to a use permit upon compliance with the requirements of state and local laws and regulations, its claim must be rejected for all of the reasons set forth in the Court's prior order of November 26, 1980.

The Constitution does not create property interests, it only protects them. Plaintiff must look to state law or other independent sources of such interests. Perry v. Sinderman, 408 U.S. 593, 602 (1972). The Planning Commission in this case operates under a municipal code which makes the issuance of a permit discretionary and allows the Commission to consider numerous factors including the general welfare of the City. Municipal Code § 10833-34. Plaintiff's claim that it had a protectible interest in the issuance of a permit must therefore be rejected. Jacobson v. Hannifin.

627 F.2d 177 (9th Cir. 1980); see also Vruno v. Schwarzwalder, 600 F.2d 124 (8th Cir. 1979).

Defendants' motions to dismiss are therefore granted.

IT IS SO ORDERED.

DATED: January 3[illegible], 1981

WILLIAM J SCHWARZER
United States District Judge